INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	3
Conclusion	11

CITATIONS

Cases:	
Alford v. *United States*, 282 U.S. 687	9, 10
Glasser v. *United States*, 315 U.S. 60	10
Lopez v. *United States*, 373 U.S. 427	8
Martin v. *United States*, 372 F. 2d 63, certiorari denied, 387 U.S. 919	5
Nardone v. *United States*, 308 U.S. 338	4
Powell v. *United States*, 208 F. 2d 618, certiorari denied, 347 U.S. 961	11
Singer v. *United States*, 380 U.S. 24	8
United States v. *Campbell*, 337 F. 2d 396, certiorari denied, 379 U.S. 983	4
United States v. *Eley*, 314 F. 2d 127	11
United States v. *Laughlin*, 222 F. Supp. 264	5
Weiss v. *United States*, 308 U.S. 321	5
Statutes and rules:	
Federal Communications Act, 47 U.S.C. 605	4
21 U.S.C. 174	2
26 U.S.C. 4705(a)	2
Rule 30, F.R. Crim. P.	8
Rule 52(b), F.R. Crim. P.	9
Miscellaneous:	
Manual on Jury Instructions in Federal Criminal Cases, 33 F.R.D. 533	6

QUESTIONS PRESENTED

1. Whether the informer's testimony as to telephone conversations with petitioner could properly be corroborated by narcotics agents who listened to the conversations on a regular telephone extension.

2. Whether the trial court's failure to give a specific instruction on the weight to be given to an informer witness' prior felony conviction constituted prejudicial error where the court did instruct that the testimony of an informer should be weighed with great care.

3. Whether the trial court erred in refusing to require an informer to give his address at the time of trial.

4. Whether the trial court abused its discretion in permitting a narcotics agent to remain at government counsel's table, after excluding all other witnesses at petitioner's request.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Northern District of Illinois on ten counts of an indictment charging unlawful possession and sale of narcotics in violation of 21 U.S.C. 174 and 26 U.S.C. 4705(a).[1] On May 3, 1966, he was sentenced to ten years' imprisonment on each of the counts, the terms to run concurrently. The court of appeals affirmed, one judge dissenting. (Pet. App. A).[2]

---

[1] Petitioner was acquitted on an eleventh count charging a conspiracy; three co-defendants were acquitted on all counts.

[2] The dissent was based solely on the adequacy of the trial court's instructions to the jury.

The government's evidence (the sufficiency of which is not challenged here) showed that petitioner was involved in the sale of narcotics on five separate occasions. Ted Haney, an informer for the Federal Bureau of Narcotics, testified that on October 31, 1963, he telephoned petitioner and arranged for a sale of narcotics. Haney met petitioner at the Web Tavern, where the latter was employed (Tr. 104).[1] After a short conversation, Haney gave petitioner $750 in exchange for a packet of heroin (Tr. 107–110, 281, 755). Haney testified to four subsequent transactions, each beginning with a telephone call to arrange a meeting and concluding with a purchase of narcotics from petitioner at the Web Tavern (Tr. 113–116, 119, 121–129, 157–163, 168–171). Each of the telephone conversations was overheard by a federal agent listening in on a regular telephone extension (Tr. 93–94, 98–100, 119, 157–160, 173, 286–291, 308–309, 317–318, 325–326, 391–401). The actual exchange of narcotics on each occasion was observed by federal agents who testified to their observations (Tr. 279, 497, 501–502, 513–517, 563, 565–566, 571).

ARGUMENT

1. After the informer, Haney, testified, the government called as witnesses two federal narcotics agents who corroborated Haney's testimony regarding the telephone conversations which they had monitored. On direct examination, Agent Cook stated that Haney had

[1] "Tr." refers to the transcript of proceedings in the district court; "R." refers to the original record on appeal filed in the court of appeals.

given him permission to listen to the November 13 telephone conversation. Petitioner objected that the answer was hearsay, and the judge then asked whether permission was necessary. The prosecutor answered in the negative, and counsel for all defendants remained silent. Agent Cook's response was then ordered stricken from the record (Tr. 287–288). Thereafter, Agents Cook and Meyer testified to the other conversations without objection from petitioner.

For the first time on appeal, petitioner contended that the agents' corroborating testimony was erroneously admitted into evidence in violation of the Federal Communications Act (47 U.S.C. 605) because there had been no showing that the informer had consented to the listening. The court of appeals held that petitioner, in failing to base his objection on Section 605, did not preserve the question for appeal, and, in any event, failed to meet his burden of showing a violation of Section 605. There is no occasion for further review in this regard.

In order to establish the inadmissibility of intercepted telephone communications, the burden is on the defendant, in the first instance, to show a violation of Section 605. *Nardone* v. *United States*, 308 U.S. 338, 341; *United States* v. *Campbell*, 337 F. 2d 396, 398–399 (C.A. 7), certiorari denied, 379 U.S. 983. The evidence clearly showed that in each instance the agents listened to the telephone conversations on regular extensions in view of Haney and that Haney knew that the agents were monitoring his conversations with

petitioner (Pet. App. 2a). Petitioner made no effort to cross-examine Haney or the agents on the question of consent or the circumstances under which it was given. In *Weiss* v. *United States*, 308 U.S. 321, relied upon by petitioner, this Court held that consent to the *divulgence* of illegally intercepted communications was insufficient where the consent was obtained after the parties to the conversations had been confronted with the fruits of the illegal monitoring and had been induced to plead guilty. *Weiss* represents a refinement of the consent doctrine to prevent law-enforcement authorities from using illegally obtained evidence to coerce the victims of the unlawful interception into giving their consent. In the present case, however, the court of appeals found that, "every fair inference to be drawn establishes that Haney consented to the monitoring of his calls to [petitioner]. There is nothing in the record to indicate that threats or promises were used to obtain his cooperation and consent" (Pet. App. 9a).[4]

2. On direct examination of the informer, Haney, it was shown that he had been convicted of murder in 1933 (Tr. 92). In discussing proposed instructions, the trial judge indicated that he would give the standard "LaBuy" instruction with regard to the effect of a felony conviction on a witness' credibility (Tr. 1480-

[4] In *United States* v. *Laughlin*, 222 F. Supp. 264 (D.D.C.), also cited by petitioner, the district court expressly found, after a hearing, that the consent was induced by promises of leniency. See *Martin* v. *United States*, 372 F. 2d 63 (C.A. 7), certiorari denied, 387 U.S. 919.

1481).[5] Counsel for petitioner submitted the following proposed instruction (R. 72):

> You are instructed that Ted Haney is an informer for the Bureau of Narcotics. The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by his interest or his prejudice against the defendant.
>
> You are further instructed that the evidence shows that the informer, Ted Haney, has been convicted of a felony. The testimony of a witness may be discredited or impeached by showing that he has been convicted of a felony. As such his testimony must be carefully examined and weighed with great care.

Petitioner's co-defendant, DiCarlo (who had a prior conviction and who had testified in his own behalf), objected to the tendered instruction on the ground that the last sentence inaccurately stated that a witness' prior felony conviction, by itself, required that

---

[5] The *Manual on Jury Instructions in Federal Criminal Cases*, prepared by the Seventh Circuit Judicial Conference Committee on Jury Instructions (Judge Walter J. La Buy, Chairman), suggests the following instruction (33 F.R.D. 533, 576):

"The testimony of a witness may be discredited or impeached by showing that he had been convicted of a felony. Prior conviction does not render a witness incompetent to testify, it merely reflects on his credibility. It is the province of the jury to determine what weight, if any, should be given to such prior conviction as impeachment."

his testimony be "carefully examined and weighed with great care" (Tr. 1556–1558). The government objected to that portion of the instruction which recited that the informer had received pay for his testimony, since there was no evidence in that regard. The court accordingly revised the instruction and gave it in the following form (Tr. 1560–1561, 1857):

> If you find from the evidence that Ted Haney is an informant of the Federal Bureau of Narcotics, you may consider the principle that the testimony of an informer who provides evidence against the defendant or [sic] for immunity from punishment or personal advantage or vindication must be examined and weighed by you with greater care than the testimony of an ordinary witness. As such testimony must be carefully examined and weighed with great care.

The court also gave a general instruction listing several factors which the jury could consider in assessing the credibility of witnesses[6] and a specific in-

---

[6] "It is your province to determine the credibility of the witnesses and the weight to be given to their testimony. In weighing the testimony of each witness, you should consider his relationship to the government or to the defendant, the witness' interest, if any, in the outcome of the case, his manner of testifying, his candor, his fairness and intelligence and the extent to which he has been corroborated or contradicted, if at all, by other credible evidence, and if you believe that a witness wilfully has sworn falsely to a material fact, you may disregard his testimony in part or in whole except insofar as it may have been corroborated by other credible evidence.

* * * * * *

"You should consider all of the facts and circumstances in determining what credence to give to the testimony of each witness." Tr. 1860–1861.

struction limiting the jury's consideration of a defendant's prior convictions solely to the question of his credibility as a witness.'

Petitioner objected to the court's instruction on Haney's testimony, but he did not bring to the court's attention the fact that the instruction regarding the effect of a felony conviction on a witness' credibility had been omitted. See F.R. Crim. P. 30; *Singer* v. *United States*, 380 U.S. 24, 38; *Lopez* v. *United States*, 373 U.S. 427, 436. Notwithstanding his failure to specify the grounds of his objection, petitioner now contends that the court's omission was plain error because it "might" have led the jury to believe that Haney's conviction was not to be considered in weighing his testimony (Pet. 18). This contention is plainly without merit. The district court properly rejected petitioner's tendered instruction, which erroneously sought a requirement that Haney's testimony "must be carefully examined and weighed with great care" on the basis of his felony conviction. But the court did use that exact language in cautioning the jury on the matter which bore most critically on Haney's credibility—his status as an informer for the government. Furthermore, Haney's testimony was corroborated in all material respects by other witnesses. In these circumstances the trial court's failure to in-

---

[1] "Evidence of a defendant's previous conviction of a felony is to be considered by you only insofar as it may affect the credibility of the defendant as a witness and must never be considered by you as evidence of guilty [sic] of any of the offenses for which he is standing trial." Tr. 1863.

struct the jury on one aspect of credibility did not affect any substantial rights of petitioner. See F.R. Crim. P. 52(b).

3. During petitioner's cross-examination of Haney, the trial court sustained the government's objection to counsel's question as to where Haney lived at the time of trial, although it did allow a question as to his address at the time of the offenses.[8] Petitioner contends that this limitation on the scope of cross-examination constituted reversible error, relying on this Court's decision in *Alford* v. *United States*, 282 U.S. 687.

Although in both *Alford* and the present case the trial court refused to allow a defendant to cross-examine a government witness concerning his address at the time of trial, the cases are readily distinguish-

[8] "By Mr. ROTENBERG:

"Q. Mr. Haney, what is your address?

"Mr. PHELAN. I object to this as being irrelevant and immaterial.

"Mr. ROTENBERG. I think we have a right to know where the defendant lives, your Honor. It goes to credibility.

"Mr. PHELAN. Your Honor, how does it affect credibility? He lives in the City of Chicago. I will make him available to counsel for the defense at any time during the course of this trial.

"The COURT. Is there any other cause for your questioning?

"Mr. ROTENBERG. Your Honor, I believe that is a proper question to ask a witness, where he resides.

"The COURT. I mean, why is it proper?

"Mr. ROTENBERG. Well, I would like to know about the background of the individual when I go into my cross examination, things as far as his credibility, his stability, how long he lives at one spot, and all those factors. They are very material as to the reliability and credibility of the witness." Tr. 195–197.

able. An important element in *Alford* was the fact that the trial court's ruling blocked a line of questioning seeking to discover whether the witness was then in federal custody and whether his testimony may have been prompted by coercion or a promise of immunity (282 U.S. at 693). In the present case, on the other hand, petitioner was permitted wide latitude to inquire into Haney's motive for testifying for the government, and his environment prior and subsequent to the transactions involved in the case. In response to petitioner's questions, Haney admitted that he had been arrested for selling narcotics shortly before he began cooperating with narcotics agents (Tr. 228–230); that he had operated under the alias, "Pete Smith" (Tr. 203); and that he had a bad employment record (Tr. 242). Petitioner was also permitted to ask Haney if he had been promised leniency or pay for his testimony (Tr. 268–269). Unlike the situation in *Alford*, moreover, the informer's testimony was corroborated by other government witnesses. In these circumstances, the district court did not abuse its discretion in limiting petitioner's inquiry to Haney's address at the time of the offenses. See *Glasser* v. *United States*, 315 U.S. 60, 83.

4. Petitioner contends that the trial court erred in permitting Agent Vernon Meyer to sit at the government counsel table prior to his testifying, as an exception to its order excluding all witnesses from the courtroom. It is well established that the exclusion of witnesses is within the sound discretion of the trial

court. *United States* v. *Eley*, 314 F. 2d 127 (C.A. 7); *Powell* v. *United States*, 208 F. 2d 618 (C.A. 6), certiorari denied, 347 U.S. 961. Contrary to petitioner's argument, the record shows that the court exercised its discretion to exempt Agent Meyer from its order on the basis of the prosecutor's representation that his presence was necessary for the presentation of the government's case (Pet. App. 18a–19a, 21a). Moreover, the failure to exclude Agent Meyer resulted in no prejudice to petitioner. Meyer was the third government witness, and his testimony served only to corroborate the first telephone conversation between Haney and petitioner, the fact that Haney entered the Web Tavern on four occasions, and the transfer of the heroin from Haney to the government chemist (Tr. 391–409, 412–414, 417–419, 422–426).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

JANUARY 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1967